Otherwise, trust in international commerce would be irreparably damaged."

The plaintiffs have also alleged that the contract is lacking in certainty as the layout plans do not identify the different lots of land on which construction works are to be carried out. If this is so, how were the plaintiffs able to carry out their feasibility studies, the infrastructure and earthworks that they had already done. Moreover they had been able to describe particulars of the various lots with certainty in the letter of indemnity. To that end, I consider that the plaintiffs have not been honest in their dealings and that the application for the interim injunction is but a ploy to prevent the defendants exercising their rights under the performance bond.

The plaintiffs have also alleged that the defendants had misrepresented themselves by passing themselves off as the owners of the lands, thereby, inducing the plaintiffs to enter into contractual obligations with them. Section 1.01 of the main contract spells out the fact that DN Co. are the registered proprietors of the land. Section 1.03 makes reference to a prior contract entered between DN Co. and the defendants whereby the latter agreed to purchase the lands from the former. Section 1.05 goes further to explain that separate documents of title have not yet been issued to the defendants and that the defendants' standing over the lands is that of beneficial owners only. That being the case, there is no truth in the plaintiffs' allegation of any misrepresentation on the part of the defendants on their status of ownership of the said lands.

Whilst alleging misrepresentation on one hand, the plaintiffs had also affirmed and performed part of their obligations under the contract by carrying out infrastructure and earthworks at the site and made payments pursuant to section 3.01(b) of the contract, facts that were not disclosed by them in their application for the interim injunction. This in itself is a ground for dissolving the injunction.

Lastly the plaintiffs plead that since the contract does not contain any provision relating to the obtaining of the approval of the Foreign Investment Committee (FIC), the contract is void and unenforceable. Reference to the FIC approval must mean the "Guidelines for the Regulation of Acquisition of Assets, Mergers and Takeovers," issued by the Government in 1974 and whether such Guidelines apply to this contract must depend on whether the parties have agreed to such Guidelines being made a term of the contract. There is no evidence to that effect and in any case the Guidelines have been held to have no force of law whatsoever but are of advisory character only and non-compliance whatsoever will have no effect as to the legality or otherwise of the contract. See the cases of *Ho Kok Cheong Sdn. Bhd. & Anor.* v. *Lim Kay Tiong & Ors.*[8] and *David Hey* v. *New Kok Ann Realty Sdn. Bhd.*[9]

Following the *American Cyanamid's* case[10] as there are no issues to be tried on the performance bond, and in the event the Bank acts on the indemnity in which case, the plaintiffs would be adequately compensated in damages, I had dissolved the interim injunction and granted costs to the defendants/applicants.

Order accordingly.

Solicitors: *Mah Kok & Din; S.P. Lim & Koh.*

DIRECTOR GENERAL OF INLAND REVENUE v. OOI GUAN HOE

[A.C.J. (Mohamed Dzaiddin J.) July 12, December 26, 1985 & January 15, 1986]

[Penang – Tax Appeal No. 1 of 1983]

Revenue Law – Devolution of real properties to administrator on death – Transfer by administrator to beneficiary – Sale by beneficiary – Acquisition date – Bare trustee – Tax payable – Whether interest payable on overpayment of tax – Real Property Gains Tax Act, 1976, s. 12; Schedule 2, paras 2, 3(a), 4(3), 15 & 28 – National Land Code, 1965, s.215 – Income Tax Act, 1967, Schedule 5, para 34.

In this tax appeal by the Revenue by way of case stated against the decision of the Special Commissioners, two questions requiring decisions, *viz.* the date of acquisition and whether paragraph 28, Schedule 2, of the Real Property Gains Tax Act, 1976, applies in this case. The respondent is the administrator of his father's estate as well as its sole beneficiary. After the death of the deceased (who died in 1941) the subject properties were transferred to the respondent as administrator. The issues arose when the ownership of the properties was transferred by him as administrator to himself as the beneficiary. They were registered in his name as the new owner on September 4, 1975. On December 18, 1978 *i.e.* 4th year after acquisition on September 4, 1975) the respondent sold the properties to a purchaser for $160,000. The properties were valued at $128,000 as at September 4, 1975.

Held: (1) the acquisition value for the purpose of section 12 of the Real Property Gains Tax Act is on the date of acquisition by the respondent as the beneficiary, which is the date of the vesting order, *i.e.* December 4, 1975.

(2) as the respondent was not a bare trustee, paragraph 28, Schedule 2, does not apply in this case;

(3) the appeal is allowed and the assessment is amended accordingly. The tax payable is $4,661.60. The Revenue shall refund to the respondent the sum of $7,327.80, *i.e.* the difference between the original requisition of $11,989.40 and the amended tax of $4,661.60;

(4) the respondent is not entitled to claim interest on the balance of $7,327.80. No order as to costs was made.

Case referred to:

(1) *General Tire and Rubber Company* v. *Firestone Tyre Rubber Company Ltd.* [1975] 2 All E.R. 173, p. 188.

TAX APPEAL.

Abdul Hamid b. Haji Mohamed (Senior Federal Counsel) for the appellant.

N. Shanmugam for the respondent.

Cur. Adv. Vult.

Mohamed Dzaiddin J.: This is an appeal by the Revenue by way of case stated against the decision of the Special Commissioners of Income Tax under para. 34 of Schedule 5 of the Income Tax Act 1967 made on April 28, 1983 on the ground that it was wrong in law. The Special Commissioners held that the requisition dated May 16, 1980 issued by the appellant for the real property gains tax amounting to $11,989.40 for the year of assessment 1978 under section 12 of the Real Property Gains Tax Act, 1976 ("the Act") for properties known as holdings 1579 and 1580 of section 4, Bandar Butterworth, District of Province Wellesley North ("the subject properties") was wrong. Their finding is that pursuant to para. 28 of Schedule 2 of the Act the subject properties were deemed to be acquired by the respondent prior to January 1, 1970. They are also of opinion the acquisition value is the market value as at that date, and therefore the rate of tax to be applied in the circumstances of the case is only 5 percent.

The facts as found by the Commissioners are as follows:

"i) The respondent is the administrator of the estate of Cheah Poh In @ Cheah Poh Im (who died intestate in December, 1941) pursuant to Letters of Administration granted by the Japanese Military Administration, and legally substituted by an Order of the Penang High Court on June 26, 1947;

ii) the respondent is also the lawful son of the deceased and by an Order of the Penang High Court dated August 25, 1975 (endorsed on September 4, 1975 by the Commissioner for Land Registration Department) the subject properties were vested in him as the sole beneficiary of the deceased;

iii) by an Agreement of Sale dated December 18, 1978, the respondent agreed to sell to Teh Ah Kong of No. 62, Irving Road, Penang, Lim Ah Khim of 314-A Perak Road, Penang and Ong Lay Wah of No. 62, Irving Road, Penang, the subject properties at a purchase price of $160,000;

iv) on the subject properties stood a house numbered TBP 1283, which was occupied by a tenant, and the subject properties were sold without vacant possession of the said house;

v) the sale of the subject properties was duly completed and was registered on June 15, 1979;

vi) in 1965 the State Government of Penang compulsorily acquired certain portions of the subject properties as follows:

Lot No.	*Original area*	*Area acquired*	*Remaining area*
1579	27,361 s.f.	17,237 s.f.	10,124 s.f.
1580	23,005 s.f.	1,050 s.f.	21,955 s.f.

vii) the open market values of the subject properties at the following dates were as follows:

(a) as at 1.1.70 – $ 90,000
(b) as at 4.9.75 – $128,300
(c) as at 18.12.78 – $160,000

viii) the appellant served a requisition (dated May 16, 1980) on the respondent pursuant to section 12 of the Act in respect of the chargeable gain accruing to the respondent on the disposal of the subject properties on the following basis:

Disposal price (on December 18, 1978):		$160.000
Less Court fees	$ 192	
Commission	$3,200	$ 3,392
		$156,608
Acquisition Price, i.e. valuation as at 1.1.1970 (the deemed date of acquisition): (paragraph 4(3) Schedule 2)		$ 90,000
Chargeable Gain:		$ 66,608
Less exemption under paragraph 2, Schedule 4		$ 6,661
Net Chargeable Gain:		$ 59,947

Real Property Gains Tax on the Net Chargeable gain at 20 percent, *i.e.* $11,989.40, pursuant to Schedule 5 –

'Disposal in the fourth year after the date of acquisition of the chargeable asset,' *i.e.* assuming the actual date of acquisition was August 25, 1975."

The central issues in this appeal are simply these:

1) When is the date of acquisition?
Because this is also the date to determine the acquisition price.

2) Does para. 28 Schedule 2 apply in this case?

At the outset of his submission, En. Abdul Hamid, Senior Federal Counsel, for the Revenue conceded that the Revenue cannot take two dates for the purpose of computation of the gains tax, one before January 1, 1970 under para. 4(3) of Schedule 2 and the other on the date of vesting of the subject properties to the respondent *i.e.* September 4, 1975. However, he contended that the date of acquisition is the date of vesting *i.e.* September 4, 1975. Therefore, on the basis of his submission, the requisition made by the Revenue under section 12 of the Act shall now be as follows:–

Disposal price (on December 18, 1978)		$160,000.00
Less Court Fees	$ 192.00	
Commission	$3,200.00	$ 3,392.00
		$156,608.00
Acquisition Price, *i.e.* valuation as at September 4, 1975 (being the date of vesting order)		$128,300.00
Chargeable Gain		$ 28,308.00
Less exemption under para. 2 Schedule 4		$ 5,000.00
		$ 23,308.00
Tax on Net Chargeable Gain at 20 percent under Schedule 5 being disposal in the 4th year shall be		$ 4,661.60

I think the difficulty in determining the acquisition date in this case is due to the respondent acting in two legal capacities. He is the administrator of his father's estate as well as the only beneficiary of the estate. The Revenue argued that he acts in two separate capacities. On the death of deceased the properties were transferred to him as administrator. As there was no gain or no loss under para. 3(a) of Schedule 2, there was no gains tax chargeable. However, it is when the ownership of the properties were transferred by him as administrator to himself as the beneficiary that para. 2 Schedule 2 of the Act applies. The paragraph states as follows:

"Subject to this Schedule, every method, scheme or arrangement by which the ownership of an asset is transferred from one person to another (including compulsory acquisition under any law) shall constitute an acquisition of the asset by the transferee and a disposal of the asset by the transferor."

I agree with the Revenue that when the assets of a deceased person devolved to him as administrator the disposal price is equal to the acquisition price (para. 3(a) Schedule 2). So no gains tax is payable. However, on September 4, 1975 when the properties were registered in his name as the new owner, then under para. 2 Schedule 2 the said transfer amounts to an acquisition by him in his capacity as beneficiary and a disposal by him as an administrator. Encik Hamid also referred to paras. 15(1)(b) and 3(a)(i) of the same schedule and section 215 of the National Land Code. Para. 15(i)(b) states that except where this Schedule provides otherwise, a disposal of an asset shall be deemed to take place, in the case where there is no agreement, on the date of the completion of the disposal of the asset and the date of completion of a disposal means the date on which the ownership of the asset disposed is transferred by the disposer. As there is no definition of the word 'transfer' in the Act and the subject matter being land, he has rightly relied on section 215 of the National Land Code because under our system of land laws, the ownership is vested upon registration.

In my opinion, the argument of Encik Abdul Hamid is cogent because the acquisition and the disposal is to and from the same person wearing two legal hats. In the circumstances of this case, para. 3 Schedule 2 only applies upon devolution of the father's properties on him as administrator. Therefore, it follows that the acquisition value for the purpose of section 12 of the Act is on the date of acquisition by the respondent as the beneficiary, which is the date of the vesting order *i.e.* September 4, 1975.

The next question is: does para. 28 Schedule 2 apply in the present case?

Para. 28 states as follows:

"In relation to assets held by a person as nominee for another person, or as trustee for another person absolutely entitled as against the trustee (or for two or more persons jointly so entitled), this Act shall apply as if the assets were vested in, and the acts of the nominee or trustee in relation to the assets were the acts of the person or persons for whom he is the nominee or trustee (acquisitions from or disposals to the nominee or trustee by that person or those persons being disregarded accordingly)."

I have read with considerable interest the reasoning of the Commissioners (see pages 15-17

of Case Stated) and the view taken in their conclusion on the applicability of para. 28. The genesis of this paragraph is section 22(5) of the British Finance Act 1965 which was subsequently reproduced in section 46 of the British Capital Gains Tax Act 1979. The Commissioners agreed with the learned authors of Patrick Soares "Trusts and Tax Planning," (1979 edition) K.R. Tingley "Key to Capital Gains Tax (Finance Act 1981)" and Butterworth's U.K. Tax Guide, 1982-83 that the word "trustee" in the said paragraph means "bare trustee." Was the respondent acting as a bare trustee at the time when the properties of the estate devolved on him as executor under para. 3(a) of Schedule 2? "A bare trustee is a person who holds property in trust for the absolute benefit and at the absolute disposal of other persons who are of full age and *sui juris* in respect of it, and who has himself no present beneficial interest in it and no duties to perform in respect of it except to convey or transfer it to persons entitled to hold it, and he is bound to convey or transfer the property accordingly when required to do so." *Halsbury's* Law of England 4th edn. Vol. 48 para. 641).

In fact, in *Parker and Mellows* on Modern Law of Trust, 4th Edition p.17, the learned authors described a bare trust as a simple trust where a trustee is simply a repository of the trust property with no active duties to perform. So if *A* gives the legal estate in property to *B* on trust for *C* absolutely, the trust is a simple trust. The only duty *B* has to perform is to transfer the legal estate in the property to *C* if *C* so directs.

In the Act, the word trustee is not defined. However, under section 3(1) of the Trustee Act 1949, trustee includes a personal representative. Although the respondent under the circumstances is a trustee, but having regard to his beneficial interest and the duties he had to perform or which he had performed to extract the Grant of Letters of Administration it is my finding that he was not a bare trustee. As such, I hold that para. 28 Schedule 2 does not apply in this case.

For the above reasons, I allow the appeal and amend the assessment accordingly. The tax payable shall now be $4,661.60 and the refund due to the respondent shall be $7,327.80.

There is, however, a further dispute between parties regarding interest. On December 26, 1985 when I delivered the judgment I requested both counsel to furnish written submissions on this issue. It is clear that the Real Property Gains Tax Act 1976 does not provide interest (see: section 24 of the Act). In my opinion, even if there is no statutory provision the present case is one of an exercise of judicial discretion. In the words of Lord Wilberforce in *General Tire and Rubber Company* v. *Firestone Tyre Rubber Company Ltd.*[1]:

> "The discretion must be exercised judicially and for reasons which can be stated. Where a wrong-doer had failed to pay money which he should have paid, justice, in principle, requires that he should pay interest over the period for which he has withhold the money."

In the present case, has the defendant been deprived of his money being the balance of the tax chargeable at the time of the appeal? My short answer is "No" because until the outcome of this appeal, the Revenue was entitled to the full amount which they had assessed. As such there was no deprivation of the sum of money belonging to the respondent. It is plain that until the outcome of the appeal the Revenue cannot be said to withhold the said balance unnecessarily or has acted unreasonably in the circumstances. In my judgment the respondent is not entitled to claim interest on the balance of $7,327.80. Therefore, in accordance with section 24(6) of the Act the Director General shall cause repayment of the aforesaid sum to be made forthwith.

I make no order as to costs.

Appeal allowed.

Solicitors: *Shan & Gooi.*

TUN DATU HAJI MUSTAPHA BIN DATU HARUN v. LEGISLATIVE ASSEMBLY OF STATE OF SABAH & ORS.

[O.C.J. (Abu Mansor J.) June 14, 1985]

[Kota Kinabalu – Civil Suit No. K482 of 1985]

Constitutional Law – Legislative Assembly – Injunction to restrain sitting – Jurisdiction – No merits in application – Sabah Constitution, arts. 13, 21 & 25 – Federal Constitution, art. 72(1).

In this case the plaintiff applied for an interlocutory injunction to restrain the Legislative Assembly of Sabah from sitting because he claimed the Yang di-Pertua Negeri had exercised his powers of summoning the sitting follow-